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AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER

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EPOCKET #:
OAR-2002-0005-0009

December 9, 2002

Air Docket
Room M-1500
U.S. Environmental Protection Agency
401 M Street, SW, Mail Code 6102
Washington, DC 20460

Attention: Docket ID No. OAR-2002-0005

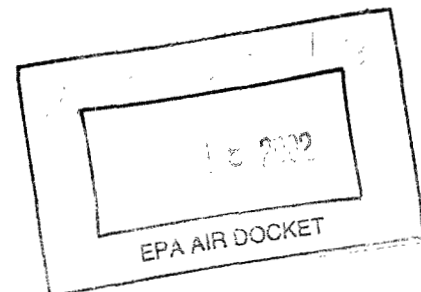
The Environmental Protection Agency (EPA) requested comments on the proposed changes to 40 CFR Part 194 found at Docket ID No. OAR-2002-0005 and referenced in the Federal Register Vol. 67, No. 154, pp 51930 – 51946 (Friday, August 9, 2002). The Environmental Evaluation Group (EEG) has reviewed these proposed changes and offers the attached comments.

Sincerely,

Matthew K. Silva
Director

MKS:LA:pf
Enclosures

cc: Inez Triay, CBFO
John D'Antonio, NMED



Environmental Evaluation Group Comments on the Environmental Protection Agency's
Proposed Changes to 40 CFR Part 194

Docket: OAR-2002-0005

Proposed Changes to 40 CFR §194.2

Comment 1 – Acceptable Knowledge Definition

The EEG supports the EPA's decision to replace the term "process knowledge" with the term "acceptable knowledge". The EEG notes that the definition of "process knowledge" as described left great latitude in applying the definition.

The inclusion of a specific definition for acceptable knowledge in the proposed §194.2 containing the phrase "...as well as data resulting from the analysis of waste..." (EPA 2002, p. 51945), might be interpreted as advocating the use of such data as the DOE's Safeguards measurements for characterizing WIPP wastes. Thus, the EEG suggests that the EPA add a discussion in the preamble to the final rule implementing this proposal to clarify the issue. The statement in the proposed §194.8(b)(1) that "Waste characterization processes will include the collection and use of acceptable knowledge; destructive and/or nondestructive techniques for identifying and measuring waste components; and the validation, control, and transmittal to the WIPP database of waste characterization data, in accordance with §194.24(c)(4)." (EPA 2002, p. 51945) might be discussed. The EEG interprets the phrase "destructive and/or nondestructive techniques for identifying and measuring waste components" to mean that radionuclide measurements are to be taken by these processes. The EEG has long supported such a requirement, and believes that the EPA should eliminate any possible confusion between the acceptable knowledge definition and the statement in the proposed §194.8(b)(1).

Proposed Changes to 40 CFR §194.6

Comment 2 - Minor Revisions Comment Period

The EPA proposes to revise §194.6 to add a rulemaking process for substituting "minor alternative provisions" of the Compliance Criteria. As part of this process, the EPA is proposing to reduce the comment period from 120 days to 30 days for minor changes. The EEG concurs that the 120 day comment period is excessive, but is concerned that 30 days may be insufficient for interested parties to make comments, especially during periods which include major holidays. The EEG suggests that a 45 day comment period may be more appropriate.

Proposed Changes to §194.8

Comment 3 - Waste Characterization Program Inspections

The EPA proposes to eliminate the requirement under §194.8 that characterization programs for each waste stream be approved prior to that waste stream's shipment to the WIPP. The EPA is proposing, in part, to conduct a baseline inspection of the waste characterization program at the site to verify that an adequate system of controls has been established in plans and technical procedures and that those plans and procedures are adequately implemented (EPA 2002, p. 51936). The EPA may conduct follow-up inspections to the baseline and will continue to conduct inspections under §194.24 to confirm the continued compliance of the programs.

The EPA acknowledges (EPA 2002, p. 51935) the importance of site inspections:

Inspections of waste characterization programs at individual sites are the best way for us to verify that the sites have identified the actual characteristics of the waste.

and

Direct observation of the site's activities greatly increases our confidence in their effectiveness.

The EEG concurs that the current inspection requirement is excessive. However, the EEG would suggest:

- 1) That baseline inspections be conducted at each site for each of the three waste summary category groups (or for as many groups as are associated with a site). This is because characterization methods are likely to be applied differently to each group. The EPA partially recognizes this in discussing this section: "...which nondestructive assay techniques may be effective for a given waste stream depends in part on the physical form of the waste..."(EPA 2000, 51939). Acceptable knowledge, nondestructive assay, and radiographic/visual examination techniques are greatly affected by the differences between the three summary category groups, and the EPA should tailor its approval process to cover these three major physical forms as separate processes.
- 2) That a maximum time period be specified for which the site baseline inspection is valid, or a maximum time between inspections conducted under §194.24. The EEG suggests that a two to three year maximum may be appropriate.

The EPA should also take into account the events at the Savannah River Site. In April of 2001, the cover letter and EPA report for a November, 2000 inspection approved of the SRS program for characterization of a single debris waste stream (EPA, 2001). The December 2002 audit was intended by the DOE to expand this approval to other debris waste streams; however, the EPA's inspection report found that "During the inspection, EPA determined that SRS did not demonstrate that the characterization systems inspected were adequate to be extended to all retrievably stored, contact-handled debris waste" (EPA, 2002a). Thus, the requirements for baseline inspections should ensure that there is some surety that additional waste streams to those actually audited will be able to be characterized in a way that maintains the quality of characterization established by the baseline inspection.

Comment 4 – Justification

The EEG is concerned that the EPA uses, in part, a resource justification (EPA 2002, 51938-51939):

If EPA must complete a \$194.8 inspection for each new waste stream, group of waste streams, or waste characterization process, the demands of this inspection regime will overwhelm our resources.

Justification for reducing regulation should be made on technical bases, not on resource considerations.

Comment 5 – Tier System

The EPA discusses a tiering approach in the preamble (EPA 2002, p. 51939-51940) in which the EPA will specify tier assignments for DOE reporting of changes to the approved waste characterization process. EPA will determine as a result of a baseline audit which changes would be Tier 1 (major) or Tier 2 (minor). The DOE would then inform the EPA of those changes that a site has already implemented (Tier 2), or that a site is submitting for approval (Tier 1).

The EEG's concern is that the DOE can implement changes under this tiering system prior to reporting these changes to the EPA. In an analogous situation, the DOE selection of permit modification classes for the WIPP Hazardous Waste Facility Permit have been questioned, and rejected, by the regulating authority (NMED). Many Permit Modification Requests (PMRs) have been submitted at minor class levels, only to require re-submittal as a major modification (Walker and Silva 2002).

Given this history, the EEG believes the EPA should require the DOE to seek a preliminary concurrence for tier selection, prior to formal submittal. The approval of

Tier 2 changes could be a less cumbersome process than those for Tier 1, and would not need a public comment process.

Also, it appears that Tier 2 changes agreed upon between the EPA and the DOE may never be publicly disclosed. The EEG suggests that a notification of Tier 2 changes be made, but not require a public comment period.

Comment 6 – Public Comments

In discussing public comments under the current process, the EPA states that it has "...received only nine sets of comments, which we believe to be low" (EPA 2002, 51940). Two factors may have contributed to this paucity of comments. The first is, the EPA made arrangements to treat the EEG's comments separate from the public comment process (EEG, 2000) and it is not certain that the nine sets of comments received included all of those received from the EEG. More recently, the EPA stopped listing the specific documents for which comments would be entertained in the Federal Register notices requesting comments. While the documents were available in the EPA's WIPP docket, the official docket is in Washington, D.C., somewhat distant from the western locations where the WIPP is of importance to the public. Local copies of the official docket are not always well-maintained; the last several times the EEG has attempted to use the Carlsbad public library copy of the WIPP dockets we have been told that the documents are available at the DOE's Carlsbad Field Office. Thus, access to the materials to be commented on may play a part in the low response rate. The move toward using the EPA's electronic public docket would appear to greatly reduce this availability factor in the future.

The EEG supports the proposed change to receiving public comment not only on DOE documentation but also the EPA's baseline inspection reports and proposed compliance decisions. This proposed change may attract more public comment, especially if the electronic docket initiative is widely utilized. However, the EEG suggests that the EPA could also make the results of any §194.24 inspections available for comment, just as the §194.8 inspection reports and decisions will be made available. The delay caused by the 30-day comment period would not seem to affect ongoing DOE waste characterization, and would allow the public and concerned state entities an additional opportunity for input on WIPP waste characterization activities.

Comment 7 – Baseline Public Comment Period Length

The proposed text at §194.8(2)(iv) states that "EPA will not issue a compliance decision until after the end of the public comment period described in paragraph (b)(2)(iii) of this section", but paragraph (b)(2)(iii) does not describe the length of the public comment period. The EEG recommends that the "...at least 30 days for others to comment on the

waste site's plans" stated previously [EPA 2000, 51935] be specifically cited in one or the other of these paragraphs.

Proposed Changes to §194.12

Comment 8 – Reduction in number of paper copies.

The EPA is proposing that the number of paper copies of a compliance application be reduced to five. The EEG agrees that the reduction of paper copies is beneficial, especially when electronic copies are more easily disseminated. However, the EPA needs to specify where the five paper copies are destined to ensure proper availability to all concerned parties.

References

[EEG, 2000] January 10, 2000 Neill-to-Kruger letter transmitting comments on Hanford waste characterization documents.

[EPA 2001] U.S. Environmental Protection Agency, April 3, 2001 letter from Frank Marcinowski, Acting Director, Radiation Protection Division, to Ines Triay, Carlsbad Field Office.

[EPA 2002] U.S. Environmental Protection Agency. 2002 August 9. 40 CFR Part 194, Criteria for the Certification and Recertification of the Waste Isolation Pilot Plant's Compliance With the Disposal Regulations; Alternative Provisions; Proposed Rule. Federal Register Vol 67, No. 154. Washington DC.

[EPA, 2002a] U.S. Environmental Protection Agency, "Waste Characterization Inspection Report EPA Inspection No. EPA-SRS-12.01-8 of the Savannah River Site December 11-15, 2001" (July 2002). Docket No: II-A4-22.

Walker, Ben; Silva, Matthew. 2002. EEG's Views on the Proposed Modifications to the WIPP Hazardous Waste Facility Permit. Presented at WM'02 Conference, February 24-28. Tucson.